

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35165

MANUEL LOPEZ AGUIRRE,)	2009 Unpublished Opinion No. 624
)	
Petitioner-Appellant,)	Filed: September 30, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Order denying motion to reconsider summary dismissal of post-conviction petition, affirmed in part, reversed in part and case remanded.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Manuel Lopez Aguirre appeals from the district court's denial of his motion to reconsider the summary dismissal of his post-conviction petition. We affirm in part, reverse in part and remand.

I.

FACTS AND PROCEDURE

Following a jury trial in 2000, Aguirre was found guilty of burglary and robbery. *State v. Agirre*, Docket No. 26594 (June 19, 2001) (unpublished). He was given a unified sentence of life imprisonment, with thirty years determinate, for the robbery conviction and a concurrent ten-year determinate sentence for the burglary conviction. This Court affirmed his conviction and sentences on appeal. *Id.*

Thereafter, on October 24, 2001, Aguirre filed a petition for post-conviction relief. At Aguirre's request, the district court appointed counsel to represent him in the post-conviction proceedings. The state responded by moving to dismiss Aguirre's petition on the basis that his allegations were bare and conclusory, that he had not established any genuine issues of material fact, and that he had failed to show that his trial counsel rendered deficient performance or that he was prejudiced by any deficiencies alleged. The district court ordered the state to provide a more specific response to Aguirre's claim that the court-appointed interpreter did not correctly interpret the trial proceedings. In response, the state filed an amended answer denying that the translator had been deficient and attaching an affidavit from the interpreter in support thereof. The state re-asserted that Aguirre had not presented facts to support his claim that his counsel had been ineffective by failing to adequately cross-examine the state's witnesses or by refusing to allow him to testify. The state renewed its motion to dismiss on December 2, 2002, stating as an additional ground the failure to prosecute the motion.

More than two years later, Aguirre, through counsel and without seeking leave of the court, filed an amended petition for post-conviction relief, as well as a memorandum in support thereof. He alleged ineffective assistance of counsel based on his attorney's failure to submit certain relevant evidence to independent testing, to spend adequate time with him prior to trial so as to allow him meaningful participation in his representation and the opportunity to direct his counsel to relevant, exculpatory evidence, and to adequately investigate defense witnesses. He also alleged that he was denied his constitutional right to equal protection when he was not provided a qualified interpreter at trial and that he was denied his Sixth Amendment right to confront and cross-examine witnesses because he could not fully comprehend the testimony of the state's witnesses due to inadequate translation. On March 17, 2005,¹ the district court issued a memorandum decision and order granting the state's motion to dismiss Aguirre's original petition for post-conviction relief. The court ruled that Aguirre had not alleged sufficient facts to give rise to a genuine issue of material fact as to whether the court-appointed interpreter failed to adequately interpret the trial proceedings; specifically, the court noted that Aguirre did not identify what evidence was inadequately or unclearly translated and how that inadequate translation prejudiced him. The court also ruled that he did not allege sufficient facts to raise a

¹ The record contains no explanation for the district court's failure to act on the state's renewed dismissal motion for more than two years.

genuine issue of material fact in regard to his other claims of ineffective assistance of counsel. It noted that Aguirre failed to assert what information would have been elicited if trial counsel had performed more thorough cross-examination of the state's witnesses; that Aguirre did not claim how he was prejudiced by the failure of trial counsel to adequately consult with him prior to trial or what exculpatory information would have been elicited had proper pretrial consultation taken place; and that Aguirre's assertion that he had been deprived of his right to testify due to counsel's actions was not supported by the trial transcript. As to the amended petition, the district court determined it was untimely and filed without leave of the court, and the court did not thereafter address the merits of the claims contained therein.

On March 25, 2005, Aguirre filed a motion to reconsider the order of dismissal pursuant to Idaho Rule of Civil Procedure 60(b) and a memorandum in support thereof. He requested that the district court set aside its grant of the state's motion to dismiss and that it consider the merits of his amended petition, citing as the basis for the request his post-conviction counsel's "inadvertent mistake" in having failed to file a motion for leave to amend his original post-conviction petition. The state responded that the amended petition was not properly filed and was without legal or factual basis. In a response filed on June 9, 2006, Aguirre argued for the first time that the state's motion to dismiss Aguirre's original post-conviction petition did not provide him with adequate notice of the basis for dismissal of his claims.

Aguirre proceeded to file numerous additional requests for a hearing and/or a written decision on his motion for reconsideration. On March 7, 2008,² the district court issued a memorandum decision and order denying Aguirre's motion for reconsideration and relief from judgment. He now appeals.

II.

ANALYSIS

We review a court's decision to grant or deny a motion for reconsideration for abuse of discretion. *Commercial Ventures, Inc. v. Lea Family Trust*, 145 Idaho 208, 212, 177 P.3d 955, 959 (2008); *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry

² Again, the record discloses no reason for the district court's three-year delay in acting on Aguirre's motion to reconsider the dismissal order despite Aguirre's many intervening written pleas for a decision.

to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

A. Jurisdiction

We first address the state's argument that the district court was without jurisdiction to consider the merits of Aguirre's request for reconsideration. The state contends that while Aguirre's motion to reconsider the court's summary dismissal of his post-conviction petition may be considered timely filed pursuant to I.R.C.P. 59(e), the court was without jurisdiction to address the notice issue because Aguirre failed to raise it in his initial Rule 59(e) motion, instead raising it over a year later in a brief responding to the state's objection to his motion for relief from judgment.

To support its position, the state relies on *First Bank & Trust of Idaho v. Parker Brothers, Inc.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986), where our Supreme Court held that a motion for reconsideration which does not assert some grounds for relief recognized under an existing rule, or which is not filed within the time required by such rule does not invoke the jurisdiction of the trial court. The state concedes that Aguirre's initial motion for reconsideration of the district court's dismissal of his post-conviction petition was timely filed pursuant to Rule 59(e) within fourteen days of the court's summary dismissal and therefore conferred upon the district court the jurisdiction to examine the merits of Aguirre's request for reconsideration. However, the state insists that this jurisdiction conferred upon the court fails to extend to additional issues raised after the initial motion for reconsideration.

The state's call for a very restrictive interpretation of Rule 59(e) in this context is not well taken. The Uniform Post-Conviction Procedure Act itself dictates that when considering an application for post-conviction relief, the court "shall take account of substance regardless of defects of form." I.C. § 19-4906(a). See *Still v. State*, 95 Idaho 766, 768, 519 P.2d 435, 437 (1974). And while this is certainly not an open-ended dictate, it does provide insight that the legislature did not intend for the act to be applied in a stringent, non-flexible manner. Likewise, liberality in applying procedural rules in post-conviction actions is authorized by Idaho Criminal Rule 57(b), which states that "[t]he petition for post-conviction relief shall . . . be processed

under the Idaho Rules of Civil Procedure *except as otherwise ordered by the trial court. . . .*” (Emphasis added).

Moreover, the state’s position here overlooks a specific holding of our Supreme Court that, when examining a motion for reconsideration of summary disposition of a post-conviction petition, the district court is not limited to consideration of the grounds expressly presented in the motion in support of reconsideration under Rule 59(e). In *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983), the district court had entered an order summarily granting the petitioner’s petition for post-conviction relief. On appeal from the state, the Supreme Court deemed the state’s motion to the district court to set aside the order and dismiss the post-conviction petition as a motion to alter or amend the judgment pursuant to Rule 59(e), “regardless of the title assigned to it by the state.” *Id.* at 471, 660 P.2d at 936. The court went on to hold:

Rule 59 is a mechanism “designed to allow the trial court either on its own initiative or on motion by the parties to correct errors of both fact and law that had occurred in its proceedings.” Thus, the state was, by filing such a motion, asking the trial court to reconsider its [order granting the post-conviction petition]. *The trial court was thus incorrect in limiting itself to consideration of only the grounds presented in the [motion to reconsider].*

Id. (emphasis added).

A review of the filings at issue convinces us that the notice issue raised by Aguirre in his memorandum in support of his fifth renewed request for hearing was, as he asserts, simply “part and parcel” of his original motion to reconsider which the state concedes was timely. Importantly, here, the court had not yet ruled on the initial motion to reconsider, thus the motion was still pending and the additional issues raised by Aguirre between the filing of that motion and the court finally denying his motion to reconsider were logically additional points made in support of his overarching contention--that the court had erred in summarily dismissing his petition for post-conviction relief. Where, as here, the defendant made a timely motion for reconsideration, citing legitimate grounds for relief, the district court had jurisdiction to address all issues pertaining to factual or legal errors in the proceedings regardless of whether or not they were raised in the initial motion.³

³ We also point out that this Court has looked favorably on the use of I.R.C.P. 59(e) motions to address claims of deficient notice. In *Isaak v. State*, 132 Idaho 369, 370 n.2, 972 P.2d 1097, 1098 n. 2 (Ct. App. 1999), this Court endorsed the use of a motion for reconsideration to address a notice violation prior to appeal:

B. Notice

In denying Aguirre's motion to reconsider, the district court ruled that the state's amended answer to Aguirre's petition articulated with sufficient specificity the reasoning for dismissing the claims and that since the court's dismissal of Aguirre's petition was based on the state's motion to dismiss, the court was not required to give twenty days' notice before summarily dismissing the petition.

It is well established that a petitioner is entitled to notice and an opportunity to respond before his petition for post-conviction relief is dismissed. I.C. § 19-4906(b); *DeRushé v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009); *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *State v. Christensen*, 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981); *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995). Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. If a district court determines claims alleged in an application do not entitle an applicant to relief, the district court must provide notice of its intent to dismiss and allow the applicant twenty days to respond with additional facts to support his or her claims. I.C. § 19-4906(b); *Garza v. State*, 139 Idaho 533, 536, 82 P.3d 445, 448 (2003). However, if the state files and serves a properly supported motion to dismiss pursuant to I.C. § 19-4906(c), further notice from the court is ordinarily unnecessary. *Franck-Teel v. State*, 143 Idaho 664, 668, 152 P.3d 25, 29 (Ct. App. 2006); *Martinez*, 126 Idaho at 817, 892 P.2d at 492. If the state's motion fails to give notice of the grounds, the court may grant summary dismissal only if the court first gives the applicant the above-referenced twenty days' notice of intent to dismiss. *Franck-Teel*, 143 Idaho at 668, 152 P.3d at 29.

We also take this opportunity to comment that, when this sort of procedural error has occurred in the dismissal of a post-conviction action, rather than taking an immediate appeal, it would ordinarily be more expedient for the applicant to file a motion in the district court for relief from the judgment under I.R.C.P. 11(a)(2)(B) or 59(e). Bringing the error to the district court's attention in this manner would give that court an opportunity to take prompt corrective action and could eliminate the need for, and the delay attending, an appeal.

If the dismissal is based upon the state's motion for summary dismissal, this requirement is met only if the motion states with particularity the ground on which summary dismissal is sought. *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798; *Christensen*, 102 Idaho at 488-89, 632 P.2d at 677-78. Our Supreme Court recently stated that only "reasonable" particularity is required. *DeRushé*, 146 Idaho at 601, 200 P.3d at 1150. If the notice is sufficient that the other party cannot assert surprise or prejudice, the requirement is met. *Id.* Where the state's notice does not address a petitioner's claims with sufficient particularity, the court's summary dismissal of the application is, in effect, a *sua sponte* dismissal on grounds advanced by the court, and it is obliged to comply with the twenty-day notice requirement. *Id.* Failure to provide sufficient notice ordinarily requires that an order summarily dismissing an application for post-conviction relief be reversed. *Peltier v. State*, 119 Idaho 454, 456-57, 808 P.2d 373, 375-76 (1991); *Franck-Teel*, 143 Idaho at 668, 152 P.3d at 29.

In his initial *pro se* post-conviction petition, Aguirre alleged the following claims: (1) The imposition of a unified life sentence based upon Aguirre's conviction for robbery violated Aguirre's Fifth, Sixth, and Eighth Amendment rights under the United States Constitution because the offenses for which Aguirre was convicted were his first felony convictions; (2) Aguirre was unable to understand the court-appointed interpreter in his case, which resulted in a violation of his Fifth, Sixth, and Eighth Amendment rights at trial; (3) Aguirre's constitutional due process and equal protection rights to meaningful access to courts was violated because the law library at the prison where Aguirre was housed did not contain any Spanish language translations or materials regarding the law, nor was there a person available at the prison who could assist Aguirre in translating the legal materials provided into Spanish; (4) Aguirre's trial counsel was ineffective for failing to adequately cross-examine the state's witnesses; and (5) Aguirre's trial counsel was ineffective for failing to adequately consult with Aguirre, prepare for trial and investigate witnesses.

Aguirre argues that neither the state nor the court addressed his claims that he was deprived of due process because there are no Spanish language materials in the prison law library, or any personnel to translate the English texts, that his trial counsel was ineffective for

failing to adequately investigate defense witnesses, or that his sentence was unconstitutionally excessive in light of his status as a first time felon.⁴

The entirety of the substantive portion of the state's initial motion to dismiss stated:

The State admits that the defendant was convicted of burglary and robbery in case number H9901041 and is currently serving a penitentiary sentence. The State denies all other allegations upon which the petitioner relies for relief in his petition.

Specifically, the State denies that the petitioner's public defender rendered ineffective assistance of counsel by failing to cross-examine witnesses, by failing to spend time with the defendant or prepare for trial or by not "allowing" the defendant to testify at trial.

The State moves to dismiss the petition for post conviction relief for the reason that no genuine issue of material fact is stated therein. Idaho Code § 19-4906(c)[.] Additionally, a bare conclusory statement is insufficient. The petitioner must show that there exists a material issue of fact that counsel's performance was deficient and that the deficiency prejudiced the petitioner's case. *Platt vs. State*, 134 ID 581 (S.Ct. 2000) [sic]. The petitioner has failed to show that counsel's performance was deficient and has also failed to make any showing that the deficiency prejudiced his case. For those reasons, the State moves the Court for its dismissal of the petition.

Aguirre's contention that he did not receive sufficient notice regarding his claim that his attorney failed to investigate witnesses is without merit. In its motion to dismiss, the state disputed Aguirre's claim that his counsel had been ineffective by failing to spend time with the defendant or prepare for trial. The state then noted that to succeed in pursuit of an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that he was prejudiced thereby and that "a bare conclusory statement is insufficient." The state concluded that "[Aguirre] has failed to show that counsel's performance was deficient and has also failed to make any showing that the deficiency prejudiced his case" and therefore, there was no genuine issue of material fact as to this claim. In view of our Supreme Court's decision in *DeRushé*, we conclude that the state addressed with "reasonable particularity" Aguirre's ineffective assistance claim--which included his contention that his counsel did not sufficiently investigate witnesses.

⁴ The district court's memorandum decision and order addressed Aguirre's claims with regard to the allegation that the court-appointed translator had failed to adequately or accurately translate the proceedings, that he had received ineffective assistance based on his allegation that trial counsel failed to adequately cross-examine witnesses, that he was denied his right to testify, and that counsel failed to consult with him prior to trial.

Because the state's motion to dismiss, amended answer, or renewed motion to dismiss failed to address the remaining two claims whose dismissal Aguirre contests on appeal, the court was required to give Aguirre twenty days' notice before granting summary dismissal. Since it did not, we conclude that Aguirre was not given the requisite notice prior to summary dismissal. See *Franck-Teel*, 143 Idaho at 668, 152 P.3d at 29, *Murphy v. State*, 143 Idaho 139, 151, 139 P.3d 741, 753 (Ct. App. 2006); *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996); *Martinez*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995).

III.

CONCLUSION

We conclude that the district court did not err in denying Aguirre's motion for reconsideration because Aguirre received sufficient notice for dismissal of his claim that counsel was ineffective for failing to investigate defense witnesses. However, the district court's summary dismissal of Aguirre's claims that he was denied due process by the lack of Spanish-language materials in the law library or interpretation of the materials that were available, and that the sentence imposed was excessive was, in effect, a *sua sponte* dismissal pursuant to I.C. § 19-4906(b), and the district court was required to provide notice of the intent to dismiss and to provide Aguirre with twenty days to respond. Our decision does not, of course, preclude another summary dismissal on remand on bases adequately articulated in a notice of intent to dismiss or on a motion from the state. The order of the district court denying Aguirre's motion for reconsideration is affirmed in part, reversed in part, and the case is remanded.

Chief Judge LANSING **CONCURS**.

Judge GRATTON, **CONCURRING IN PART AND DISSENTING IN PART**.

I begin with a comment on the Idaho Rules of Civil Procedure and their application in post-conviction relief actions. An application for post-conviction relief is a civil proceeding governed by the Idaho Rules of Civil Procedure. *Stuart v. State*, 127 Idaho 806, 813, 907 P.2d 783, 790 (1996). It appears that the Rules of Civil Procedure are too often overlooked or given insufficient regard by the parties in the processing of post-conviction relief actions. In my view, stricter adherence to the Rules may serve to avoid procedural issues in the district courts which may become issues on appeal, unnecessarily delaying resolution of potentially meritorious claims.

In this case, Aguirre's motion to reconsider, filed on March 24, 2005, stated that it was brought pursuant to Rule 60(b). Nearly one year later, on March 21, 2006, Aguirre filed a motion for relief from judgment, citing Rules 56(d) and 60(a). The majority contends that the State has conceded that Aguirre filed a timely Rule 59(e) motion. However, the State only acknowledged prior decisions which indicate that a motion to reconsider summary dismissal of a post-conviction application could be considered as a Rule 59(e) motion. See *Ross v. State*, 141 Idaho 670, 671, 115 P.3d 761, 762 (Ct. App. 2005). The *Ross* Court cited *Hamilton v. Rybar*, 111 Idaho 396, 724 P.2d 132 (1986), for this proposition. However, the *Hamilton* court indicated that the request for reconsideration could be treated as a Rule 59(e) motion because, at the time, the Idaho Rules of Civil Procedure did not provide for a motion to reconsider.¹ One year later, though, in 1987, the Rules were amended to include Rule 11(a)(2)(B) which expressly provides for a motion for reconsideration within 14 days of the court's entry of judgment.² The point here is not that the district court was without jurisdiction to entertain the motion to reconsider as a Rule 11(a)(2)(B) or 59(e) motion, but that cavalier regard for the Rules should be discouraged. While I acknowledge that Idaho Code § 19-4906(a) provides that the courts should take into consideration substance over form, that does not mean that the parties or courts should disregard the rules. Rule 7(b)(1), to which I will return, provides that a motion shall state the number of the applicable civil rule under which the motion is brought. Aguirre did not expressly bring a Rule 11(a)(2)(B) motion for reconsideration or a Rule 59(e) motion.³

¹ See also *State v. Goodrich*, 104 Idaho 469, 471, 660 P.2d 934, 936 (1983).

² Rule 58(a), while it is also often disregarded, mandates entry of a judgment which is to be a document, separate from the court's decision. The entry of the judgment triggers timeframes under Rule 11(a)(2)(B). All decisions are interlocutory until entry of the judgment. Thus, while a separate judgment is sometimes not entered and the court's decision is treated as the judgment, technically, Rule 11(a)(2)(B) still applies to provide a mechanism for reconsideration until a judgment is entered.

³ By pointing out that the motions actually filed here did not cite to the applicable rules for reconsideration, I mean only to suggest that our rules exist for a reason and should be actually followed as closely as possible. On the other hand, I very much encourage post-conviction applicants to move for reconsideration of summary dismissal if notice problems exist, in order to give the district court an opportunity to address the issue of notice before it becomes an appellate issue.

In addition, neither the Rule 60(b) motion nor the motion brought pursuant to Rules 56(d) and 60(a) sought relief on the ground that the State's motion for summary dismissal lacked sufficient particularity as to any or all claims.⁴ On June 9, 2006, over one year after the court's decision, Aguirre filed a reply brief in support of the second motion and, for the first time, raised the issue of sufficiency of notice. The majority states that the issue raised in that reply brief was simply "part and parcel" of the initial motion for reconsideration and, thus, was timely from a jurisdictional point of view. This Court will not address an issue that was raised for the first time in a reply brief. *State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993); *State v. Hayes*, 146 Idaho 353, ___, 195 P.3d 712, 716 (Ct. App. 2008). However, we are apparently requiring the district court to consider such new issues, which I believe may be allowed but not mandated by *Goodrich*, 104 Idaho at 471, 660 P.2d at 936. Moreover, Rule 7(b)(1) states that the motion (not a reply brief) shall "state with particularity the grounds therefor" and "shall set forth the relief or order sought." While the district court may take up an issue raised in a reply brief, the rules certainly do not require it. Simply put, the motions here did not state lack of notice as a ground for relief nor ask for relief for lack of notice.

Now, I pause here to state, with emphasis, that I can find no justification in the record for the district court to take more than two years to decide the State's motion for summary dismissal or nearly three additional years to decide Aguirre's motions. Resolution of potentially meritorious claims affecting an applicant's liberty should not be so delayed without apparent justification. However, delay by the district court does not provide grounds for raising issues on a seriatim basis.

I concur with the majority that Aguirre received sufficient notice for dismissal of his claim that counsel was ineffective for failing to investigate defense witnesses and, since we are not asked to review the correctness of dismissal of that claim on the merits, that it was properly dismissed.

I do not believe that Aguirre's constitutionally-based issues regarding an excessive sentence for a first time felon and lack of Spanish language materials or persons to translate in

⁴ The court was asked to reconsider its refusal to allow the amended application, which was filed without leave of the court, and to thereupon consider and rule upon two issues raised therein, ineffective assistance of counsel for failure to request independent testing of evidence and for failure to investigate the motives of the key investigating officer. Both motions asserted the same issues.

the prison law library were timely and properly raised in the motion for reconsideration. I also disagree with the majority's finding of no notice as to these issues. The State's motion indicates that:

The State moves to dismiss the petition for post conviction relief for the reason that no genuine issue of material fact is stated therein. Idaho Code § 19-4906(c)[.] Additionally, a bare conclusory statement is insufficient.

The State's motion sought summary dismissal of all claims. While the motion did not specifically itemize each individual claim, I do not believe that it is necessary to do so. Once it is established that the State raises the issue of the applicant's failure to support the claims so as to create a genuine issue of material fact, whether and to what extent the motion and memorandum identifies or further addresses any or all of the individual claims does not change the fact that notice of the ground for dismissal was given and that all claims were placed at issue by the motion. Under *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009), a motion for summary dismissal on the ground of lack of sufficient evidence to create a genuine issue of material fact "does not require explaining what further evidence is necessary, particularly since it may not exist." *Id.* at 601-02, 200 P.3d at 1150-51.⁵

Since *DeRushé* requires nothing further in the motion to dismiss than simply stating that the evidence fails to create a genuine issue of material fact, I would hold that whenever the sufficiency of the evidence is stated as a ground for summary dismissal, all of the applicant's claims are deemed placed at issue on that basis. This is so regardless of whether the motion states other grounds or provides argument as to some but not all of the claims specifically.⁶ This

⁵ Idaho Code § 19-4906(c) provides for summary dismissal when "there is no genuine issue of material fact." That is the ground set forth in the State's motion. A genuine issue of material fact is created by the applicant submitting evidence in support of the claim. Thus, stating as a ground for summary dismissal that the application has failed to create a genuine issue of material fact places the sufficiency of the evidence at issue. In *Downing v. State*, 132 Idaho 861, 863-864, 979 P.2d 1219, 1221-1222 (Ct. App. 1999), this Court stated that "simply echoing the language of I.C. § 19-4906(b) is insufficient" for the court to provide notice, citing *Banks v. State*, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993). To the extent that holding has been considered to be applicable to I.C. § 19-4906(c), I believe it is disavowed by *DeRushé*, at least with respect to the ground for dismissal of lack of a genuine issue of material fact. A motion which generally states a lack of genuine issue of material fact as the ground for dismissal should be sufficient to test the sufficiency of the evidence supporting the applicant's claims.

⁶ A recurring problem has arisen when the State's motion generally avers that the applicant has failed to support its claims so as to create a genuine issue of material fact but then provides

would eliminate confusion regarding which claims may be included in the motion on that ground. Moreover, this is not unfair to the applicant as an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, since the application itself must present or be accompanied by admissible evidence supporting its allegations, or be subject to dismissal, it should not unduly burden the applicant to require that such evidence is available and submitted to the court on all such claims, if not with the application, at least at such time as the court takes up the question of summary dismissal.

Therefore, contrary to the majority's conclusion that the State utterly failed to address Aguirre's constitutionally-based issues, the State did move to dismiss those claims on the basis of failure to create a genuine issue of material fact. While the district court did not specifically mention those claims in its order of dismissal, the district court granted the State's motion. The court, therefore, should be deemed to have dismissed the claims on the grounds set forth in the State's motion. Therefore, the issues were dismissed for lack of a genuine issue of material fact, a ground raised in the State's motion, and since we are not asked to review the correctness of dismissal on that ground, dismissal should be affirmed.⁷

further argument as to only some of the claims. In that instance, the State has taken the view that all claims are placed at issue by the general assertion of the ground for dismissal. Applicants argue that only the claims as to which further argument is provided are placed at issue on that ground.

⁷ Additionally, Aguirre's claim regarding lack of Spanish language materials in the prison's law library refers to his post-conviction claims, not the underlying criminal matter. When Aguirre was appointed post-conviction counsel he could no longer demonstrate prejudice, mooting the claim. The claim of constitutional violation due to an excessive sentence appears to be barred by *res judicata*. Claims raised in post-conviction applications that have been decided on direct appeal are barred by *res judicata*. See *State v. Beam*, 115 Idaho 208, 210-11, 766 P.2d 678, 680-81 (1988); *State v. Dempsey*, 146 Idaho 327, 329, 193 P.3d 874, 876 (Ct. App. 2008). This Court previously addressed Aguirre's claim that his sentence was excessive on direct appeal. *State v. Agirre*, Docket No. 26594 (June 19, 2001) (unpublished).